No. 06-1196

In the Supreme Court of the United States

KHALED A. F. AL ODAH, ET AL., PETITIONERS,

v.

UNITED STATES OF AMERICA, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR REHEARING

DAVID J. CYNAMON
MATTHEW J. MACLEAN
OSMAN HANDOO
PILLSBURY WINTHROP SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037
202-663-8000

GITANJALI GUTIERREZ
J. WELLS DIXON
SHAYANA KADIDAL
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
212-614-6438

THOMAS B. WILNER
COUNSEL OF RECORD
NEIL H. KOSLOWE
AMANDA E. SHAFER
SHERI L. SHEPHERD
SHEARMAN & STERLING LLP
801 Pennsylvania Ave., N.W.
Washington, DC 20004
202-508-8000

GEORGE BRENT MICKUM IV
SPRIGGS & HOLLINGSWORTH
1350 "I" Street N.W.
Washington, DC 20005
202-898-5800

Counsel for Petitioners
Additional Counsel Listed on Inside Cover

JOSEPH MARGULIES
MACARTHUR JUSTICE CENTER
NORTHWESTERN UNIVERSITY
LAW SCHOOL
357 East Chicago Avenue
Chicago, IL 60611
312-503-0890

JOHN J. GIBBONS
LAWRENCE S. LUSTBERG
GIBBONS P.C.
One Gateway Center
Newark, NJ 07102
973-596-4500

MARK S. SULLIVAN
CHRISTOPHER G. KARAGHEUZOFF
JOSHUA COLANGELO-BRYAN
DORSEY & WHITNEY LLP
250 Park Avenue
New York, NY 10177
212-415-9200

BAHER AZMY
SETON HALL LAW SCHOOL
CENTER FOR SOCIAL JUSTICE
833 McCarter Highway
Newark, NJ 07102
973-642-8700

DAVID H. REMES
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
202-662-5212

MARC D. FALKOFF
COLLEGE OF LAW
NORTHERN ILLINOIS
UNIVERSITY
DeKalb, IL 60115
815-753-0660

SCOTT SULLIVAN
DEREK JINKS
UNIVERSITY OF TEXAS
SCHOOL OF LAW
RULE OF LAW IN WARTIME
PROGRAM
727 E. Dean Keeton Street
Austin, TX 78705
512-471-5151

ERWIN CHEMERINSKY
DUKE LAW SCHOOL
Science Drive &
Towerview Rd.
Durham, NC 27708
919-613-7173

STEPHEN YAGMAN
723 Ocean Front Walk
Venice, CA 90291
(310) 452-3200

CLIVE STAFFORD SMITH
JUSTICE IN EXILE
636 Baronne Street
New Orleans, LA 70113
504-558-9867

Contrary to the government's claim (Opp. 1-2), events since the Court denied certiorari demonstrate that the Court should reconsider that decision and grant review.[1] Specifically, the government's subsequent filings confirm that the review provided under the Detainee Treatment Act of 2005 ("DTA") can *never* be an adequate substitute for habeas and that there is no reason to delay determining the important question of whether the Military Commissions Act (MCA) deprives the Guantanamo detainees of constitutionally-protected rights.

1. After the Court denied certiorari, the government finally conceded that DTA review – exhaustion of which the government says is "a principal reason" to deny certiorari here (Opp. 4) – is more limited than, and not the equivalent of, habeas review. In *Bismullah*,[2] a pending DTA case, the government filed a brief urging the court of appeals not to extend to counsel for the detainees the same access to Guantanamo that the district court granted to them under habeas. The government stated:

> [T]he district court habeas regime should not be recreated in this Court because it is not appropriate to this Court's limited review under the DTA. . . . [T]he review here is administrative in nature and is on the record of the CSRT [Combatant Status Review Tribunal]. Accordingly, factual development at Guantanamo will not be necessary in pursuing this action – the broad access to Guantanamo by private counsel under the Habeas Protective Order is therefore not necessary.[3]

Thus, the government now admits that, under the DTA, the detainees will *not* be able to develop, and the court of

[1] "Opp." refers to the Brief for the Respondents in Opposition to the Petitions for Rehearing in No. 06-1195 and this case.

[2] *Bismullah v. Gates*, No. 06-1197 (D.C. Cir.).

[3] *Id.*, Resp. Br. Address Pending Prelim. Mots. 32 (Apr. 9, 2007).

appeals will *not* be able to consider, plainly exculpatory evidence and other relevant facts outside the "record" of the CSRT that may determine the validity of their detention. The development and judicial consideration of such evidence and relevant facts, of course, is the *sine qua non* of habeas review.

2. The government also has conceded in its opposition to the petitions for rehearing that DTA review does not contemplate the judicial remedy of release from imprisonment, a remedy that is the hallmark of habeas. Instead, if the court of appeals concludes that the CSRT committed legal error and the detainee is not properly detained as an "enemy combatant," the government maintains that "a remand would be the appropriate remedy" (Opp. 7). The government speculates that such a remand "could" lead the CSRT to enter a finding that the detainee is not an "enemy combatant," and it says that, eventually, all detainees determined to be no longer enemy combatants have been released by the Defense Department (*Id.* 7-8).[4] However, the government does not suggest that, under the DTA, the court of appeals may order a release, even if it finds that there is *no* factual or legal basis for the detention.

Indeed, under the government's reading of the DTA, the Defense Department could hold a detainee forever, even where the court of appeals repeatedly invalidates a CSRT determination that a detainee is an "enemy combatant." Moreover, the government can avoid review by this Court through an endless loop of remands for further CSRT determinations followed by further DTA reviews, *ad infinitum*.

[4] In fact, detainees determined by CSRTs not to be properly detained as enemy combatants remained imprisoned at Guantanamo for months after the conclusion of the CSRT process before they were released by the Defense Department. *See* http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10204.

This is the inverse of the habeas process, where release is a matter of legal right and not executive grace.

3. In light of the government's concessions, if the detainees do have a right to habeas corpus protected by the Suspension Clause, as they maintain, then the review provided by the DTA can never be an adequate substitute for habeas and the revocation of their right to habeas by the MCA would appear to be unconstitutional. *See Sanders v. United States*, 373 U.S. 1, 14 (1963). The Court should grant certiorari to resolve this important question.

There is no reason to delay determination of whether the detainees have fundamental constitutional rights. The government, in its opposition, insists that, under the DTA, the court of appeals is authorized to consider petitioners' constitutional claims (Opp. 6). *See* DTA § 1005(e)(2)(C), 119 Stat. 2742. However, the court of appeals reiterated below (*Boumediene v. Bush*, 476 F.3d 981, 991-92 (D.C. Cir. 2007)), as it previously held in *Al Odah v. United States*, 321 F.3d 1134, 1140-41 (D.C. Cir. 2004), that, under its interpretation of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), petitioners have no rights under the Constitution. Unless and until this Court reviews and reverses that erroneous holding, it is the unshakeable law of the circuit. *See Boumediene*, 476 F.3d at 1011 (Rogers, J., dissenting) ("Although in *Rasul* the Court cast doubt on the continuing vitality of *Eisentrager*, 542 U.S. at 475-79, absent an explicit statement by the Court that it intended to overrule *Eisentrager*'s constitutional holding, that holding is binding on this court").

Petitioners were accorded the right to the Great Writ three years ago in *Rasul v. Bush*, 542 U.S. 466 (2004). Now, in the *sixth year* of petitioners' unlawful detention under inhumane conditions of confinement, it would be nothing short of tragic to force petitioners to wait another year or more to first pursue a pointless remedy and receive another decision from the court of appeals that they have no constitutional

rights before they can raise this critical issue in this Court. *See* 127 S. Ct. 1478 (statement of Stevens & Kennedy, JJ., respecting denial of certiorari) (habeas corpus "does not require the exhaustion of inadequate remedies"); *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971). That issue is ripe for decision now.

4. Finally, it is now clear that, not only is the remedy provided by the DTA inadequate, but also the underlying CSRT process was an irremediable sham. A courageous military officer, Lieutenant Colonel Stephen Abraham, United States Army Reserve, has come forward with a declaration responding to assertions about the adequacy of the CSRT process made on behalf of the government by Rear Admiral (Retired) James M. McGarrah in the *Bismullah* case. Based on his personal experience, first as a factual investigator and then as a member of a CSRT tribunal, Lieutenant Colonel Abraham avers that, in every phase, the CSRT process was infected with command influence and an illusion. *See* annexed Declaration of Stephen Abraham.

No review under the DTA can cure such a sham process. No remand by a court for such a process can be an adequate substitute for independent review by a habeas court. Therefore, no exhaustion of the DTA remedy should be required before certiorari is granted in this case.

CONCLUSION

The Court should grant the Petition for Rehearing from Denial of *Certiorari*.

Respectfully submitted,

DAVID J. CYNAMON
MATTHEW J. MACLEAN
OSMAN HANDOO
PILLSBURY WINTHROP
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, DC 20037
202-663-8000

GITANJALI GUTIERREZ
J. WELLS DIXON
SHAYANA KADIDAL
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
212-614-6438

THOMAS B. WILNER
COUNSEL OF RECORD
NEIL H. KOSLOWE
AMANDA E. SHAFER
SHERI L. SHEPHERD
SHEARMAN & STERLING LLP
801 Pennsylvania Ave., N.W.
Washington, DC 20004
202-508-8000

GEORGE BRENT MICKUM IV
SPRIGGS & HOLLINGSWORTH
1350 "I" Street N.W.
Washington, DC 20005
202-898-5800

Counsel for Petitioners
With counsel listed on inside cover

JUNE 22, 2007

Appendix

DECLARATION OF STEPHEN ABRAHAM
Lieutenant Colonel, United States Army Reserve

I, Stephen Abraham, hereby declare as follows:

1. I am a lieutenant colonel in the United States Army Reserve, having been commissioned in 1981 as an officer in Intelligence Corps. I have served as an intelligence officer from 1982 to the present during periods of both reserve and active duty, including mobilization in 1990 ("Operation Desert Storm") and twice again following 9-11. In my civilian occupation, I am an attorney with the law firm Fink & Abraham LLP in Newport Beach, California.

2. This declaration responds to certain statements in the Declaration of Rear Admiral (Retired) James M. McGarrah ("McGarrah Dec."), filed in *Bismullah v. Gates*, No. 06-1197 (D.C. Cir.). This declaration is limited to unclassified matters specifically related to the procedures employed by Office for the Administrative Review of the Detention of Enemy Combatants ("OARDEC") and the Combatant Status Review Tribunals ("CSRTs") rather than to any specific information gathered or used in a particular case, except as noted herein. The contents of this declaration are based solely on my personal observations and experiences as a member of OARDEC. Nothing in this declaration is intended to reflect or represent the official opinions of the Department of Defense or the Department of the Army.

3. From September 11, 2004 to March 9, 2005, I was on active duty and assigned to OARDEC. Rear Admiral McGarrah served as the Director of OARDEC during the entirety of my assignment.

4. While assigned to OARDEC, in addition to other duties, I worked as an agency liaison, responsible for coordinating with government agencies, including certain Department of Defense ("DoD") and non-DoD organizations, to gather or

validate information relating to detainees for use in CSRTs. I also served as a member of a CSRT, and had the opportunity to observe and participate in the operation of the CSRT process.

5. As stated in the McGarrah Dec., the information comprising the Government Information and the Government Evidence was not compiled personally by the CSRT Recorder, but by other individuals in OARDEC. The vast majority of the personnel assigned to OARDEC were reserve officers from the different branches of service (Army, Navy, Air Force, Marines) of varying grades and levels of general military experience. Few had any experience or training in the legal or intelligence fields.

6. The Recorders of the tribunals were typically relatively junior officers with little training or experience in matters relating to the collection, processing, analyzing, and/or dissemination of intelligence material. In no instances known to me did any of the Recorders have any significant personal experience in the field of military intelligence. Similarly, I was unaware of any Recorder having any significant or relevant experience dealing with the agencies providing information to be used as a part of the CSRT process.

7. The Recorders exercised little control over the process of accumulating information to be presented to the CSRT board members. Rather, the information was typically aggregated by individuals identified as case writers who, in most instances, had the same limited degree of knowledge and experience relating to the intelligence community and intelligence products. The case writers, and not the Recorders, were primarily responsible for accumulating documents, including assembling documents to be used in the drafting of an unclassified summary of the factual basis for the detainee's designation as an enemy combatant.

8. The information used to prepare the files to be used by the Recorders frequently consisted of finished intelligence

products of a generalized nature - often outdated, often "generic," rarely specifically relating to the individual subjects of the CSRTs or to the circumstances related to those individuals' status.

9. Beyond "generic" information, the case writer would frequently rely upon information contained within the Joint Detainee Information Management System ("JDIMS"). The subset of that system available to the case writers was limited in terms of the scope of information, typically excluding information that was characterized as highly sensitive law enforcement information, highly classified information, or information not voluntarily released by the originating agency. In that regard, JDIMS did not constitute a complete repository, although this limitation was frequently not understood by individuals with access to or who relied upon the system as a source of information. Other databases available to the case writer were similarly deficient. The case writers and Recorders did not have access to numerous information sources generally available within the intelligence community.

10. As one of only a few intelligence-trained and suitably cleared officers, I served as a liaison while assigned to OARDEC, acting as a go-between for OARDEC and various intelligence organizations. In that capacity, I was tasked to review and/or obtain information relating to individual subjects of the CSRTs. More specifically, I was asked to confirm and represent in a statement to be relied upon by the CSRT board members that the organizations did not possess "exculpatory information" relating to the subject of the CSRT.

11. During my trips to the participating organizations, I was allowed only limited access to information, typically prescreened and filtered. I was not permitted to see any information other than that specifically prepared in advance of my visit. I was not permitted to request that further searches

be performed. I was given no assurances that the information provided for my examination represented a complete compilation of information or that any summary of information constituted an accurate distillation of the body of available information relating to the subject.

12. I was specifically told on a number of occasions that the information provided to me was all that I would be shown, but I was never told that the information that was provided constituted all available information. On those occasions when I asked that a representative of the organization provide a written statement that there was no exculpatory evidence, the requests were summarily denied.

13. At one point, following a review of information, I asked the Office of General Counsel of the intelligence organization that I was visiting for a statement that no exculpatory information had been withheld. I explained that I was tasked to review all available materials and to reach a conclusion regarding the non-existence of exculpatory information, and that I could not do so without knowing that I had seen all information.

14. The request was denied, coupled with a refusal even to acknowledge whether there existed additional information that I was not permitted to review. In short, based upon the selective review that I was permitted, I was left to "infer" from the absence of exculpatory information in the materials I was allowed to review that no such information existed in materials I was not allowed to review.

15. Following that exchange, I communicated to Rear Admiral McGarrah and the OARDEC Deputy Director the fundamental limitations imposed upon my review of the organization's files and my inability to state conclusively that no exculpatory information existed relating to the CSRT subjects. It was not possible for me to certify or validate the non-existence of exculpatory evidence as related to any individual undergoing the CSRT process.

16. The content of intelligence products, including databases, made available to case writers, Recorders, or liaison officers, was often left entirely to the discretion of the organizations providing the information. What information was not included in the bodies of intelligence products was typically unknown to the case writers and Recorders, as was the basis for limiting the information. In other words, the person preparing materials for use by the CSRT board members did not know whether they had examined all available information or even why they possessed some pieces of information but not others.

17. Although OARDEC personnel often received large amounts of information, they often had no context for determining whether the information was relevant or probative and no basis for determining what additional information would be necessary to establish a basis for determining the reasonableness of any matter to be offered to the CSRT board members. Often, information that was gathered was discarded by the case writer or the Recorder because it was considered to be ambiguous, confusing, or poorly written. Such a determination was frequently the result of the case writer or Recorder's lack of training or experience with the types of information provided. In my observation, the case writer or Recorder, without proper experience or a basis for giving context to information, often rejected some information arbitrarily while accepting other information without any articulable rationale.

18. The case writer's summaries were reviewed for quality assurance, a process that principally focused on format and grammar. The quality assurance review would not ordinarily check the accuracy of the information underlying the case writer's unclassified summary for the reason that the quality assurance reviewer typically had little more experience than the case writer and, again, no relevant or meaningful intelligence or legal experience, and therefore had no

skills by which to critically assess the substantive portions of the summaries.

19. Following the quality assurance process, the unclassified summary and the information assembled by the case writer in support of the summary would then be forwarded to the Recorder. It was very rare that a Recorder or a personal representative would seek additional information beyond that information provided by the case writer.

20. It was not apparent to me how assignments to CSRT panels were made, nor was I personally involved in that process. Nevertheless, I discerned the determinations of who would be assigned to any particular position, whether as a member of a CSRT or to some other position, to be largely the product of ad hoc decisions by a relatively small group of individuals. All CSRT panel members were assigned to OARDEC and reported ultimately to Rear Admiral McGarrah. It was well known by the officers in OARDEC that any time a CSRT panel determined that a detainee was not properly classified as an enemy combatant, the panel members would have to explain their finding to the OARDEC Deputy Director. There would be intensive scrutiny of the finding by Rear Admiral McGarrah who would, in turn, have to explain the finding to his superiors, including the Under Secretary of the Navy.

21. On one occasion, I was assigned to a CSRT panel with two other officers, an Air Force colonel and an Air Force major, the latter understood by me to be a judge advocate. We reviewed evidence presented to us regarding the recommended status of a detainee. All of us found the information presented to lack substance.

22. What were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence. Statements allegedly made by percipient witnesses lacked detail. Reports presented generalized statements in indirect and passive forms without stating the

source of the information or providing a basis for establishing the reliability or the credibility of the source. Statements of interrogators presented to the panel offered inferences from which we were expected to draw conclusions favoring a finding of "enemy combatant" but that, upon even limited questioning from the panel, yielded the response from the Recorder, "We'll have to get back to you." The personal representative did not participate in any meaningful way.

23. On the basis of the paucity and weakness of the information provided both during and after the CSRT hearing, we determined that there was no factual basis for concluding that the individual should be classified as an enemy combatant. Rear Admiral McGarrah and the Deputy Director immediately questioned the validity of our findings. They directed us to write out the specific questions that we had raised concerning the evidence to allow the Recorder an opportunity to provide further responses. We were then ordered to reopen the hearing to allow the Recorder to present further argument as to why the detainee should be classified as an enemy combatant. Ultimately, in the absence of any substantive response to the questions and no basis for concluding that additional information would be forthcoming, we did not change our determination that the detainee was not properly classified as an enemy combatant. OARDEC's response to the outcome was consistent with the few other instances in which a finding of "Not an Enemy Combatant" (NEC) had been reached by CSRT boards. In each of the meetings that I attended with OARDEC leadership following a finding of NEC, the focus of inquiry on the part of the leadership was "what went wrong."

24. I was not assigned to another CSRT panel.

I hereby declare under the penalties of perjury based on my personal knowledge that the foregoing is true and accurate.

Stephen Abraham

Dated: June 15, 2007